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IN THE

Supreme Court of the United States

DECEMBER TERM, 1967

HENRY HAROLD HOGUE,
Petitioner,

vs.

SOUTHERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

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SOUTHERN RAILWAY COMPANY,

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

Petitioner, Henry Harold Hogue, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Georgia, entered in the case of *Southern Railway Co. v. Henry Harold Hogue,* No. 42869, on June 28, 1967, motion for a rehearing denied on July 14, 1967, in that Court. Petition for certiorari to the Supreme Court of Georgia was filed on August 9, 1967 and denied by that Court on September 7, 1967, without an opinion.

OPINIONS BELOW

The opinion of the Superior Court of Fulton County,

Georgia appears as Appendix A and at pp. 120 of the record before the Court of Appeals. The opinion of the Court of Appeals of Georgia appears herein as Appendix B and at pp. 135 of the record.

JURISDICTION

The judgment of the Court of Appeals of Georgia was dated and entered on June 28, 1967 (R. 142). A timely petition for rehearing was denied July 14, 1967 (Appendix B). Petition for certiorari to the Supreme Court of Georgia was timely filed on August 9, 1967 and denied on September 7, 1967, (R. 153), filed of record in the Court of Appeals on September 21, 1967. A stay of the issuance of the mandate of the Court of Appeals of Georgia was granted on application by petitioner for time to apply for certiorari to the Supreme Court of the United States, (R. 156). This Court's jurisdiction is invoked under 28 U.S.C.A. 1257 (3) and Rule 19-1A of this Court. The basis of jurisdiction in the Superior Court of Fulton County, Georgia, was 45 U.S.C. 51 et sequa of the Federal Employer's Liability Act.

QUESTIONS PRESENTED

- 1 -

In an action under 45 U.S.C. 51, et sequa of the Federal Employer's Liability Act where the carrier sets up a signed release by the employee as a defense, can the employee attack the release on the ground of mistake of fact and fraud, without first tendering back the money paid under the release.

Does not the decision of the Court of Appeals of Georgia deprive petitioner of his property rights under the

Fourteenth Amendment of the Federal Constitution since such a decision deprives him of his right of action (a property right) which was specifically granted to him under a Federal Statute (45 U.S.C. 51, et seq.)?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involved provisions of the Fourteenth Amendment of the Federal Constitution and provisions of the Federal Employer's Liability Act 35 Stat. 65 (1908) as amended, 45 U.S.C. 51 et sequa. The pertinent provisions being set out as Appendix "C."

STATEMENT

The State Court Federal Employer's Liability Act Suit. On June 22, 1963, Henry Harold Hogue was employed by respondent Southern Railway Company to perform work on its trains and was injured while working in its shops in the furtherance of interstate commerce. He sued Southern Railway Company under the Federal Employer's Liability Act in the Superior Court of Fulton County, Georgia (R. 5).

To this suit, Southern Railway Company filed an answer, demurrers and a plea in bar setting forth a release given to respondent and signed by petitioner (R. 18, 22, 27, 34, 39, 108, 118).

Petitioner amended his action (R. 25, 47, 110) and filed an answer to the pleas in bar (R. 52), setting forth that the release was obtained by reason of a mistake of fact of both parties as to the extent of petitioner's injuries and alleging that petitioner and respondent had relied on the assurances of the carrier's doctor that he had

only a bruised knee and was not permanently injured, whereas later it was determined that his injury was permanent and resulted in his having two operations, one of which caused him to lose his knee cap.

Petitioner alleged that under Federal law a release given under such circumstances was not a bar to his action, but the amount paid as consideration under such release would be deducted from any recovery, made by petitioner and credited to defendant.

Respondent filed demurrers to petitioner's petition as amended (R. 108, 118), such demurrers were overruled and a motion for summary judgment by respondent Railroad as to its plea in bar (R. 44) was denied (R. 120) by the trial court.

Respondent appealed to the Court of Appeals of Georgia alleging that the trial court erred in overruling its demurrers and in denying its motion for summary judgment and argued that petitioner's action could not be maintained because petitioner had failed to tender back the consideration of the release, and thus petitioner's action was barred.

Thereafter, the Court of Appeals of Georgia reversed the trial court holding that in an employee's action under Federal Employer's Liability Act, a release entered into between the employer and employee could not be attacked by the employee for mutual mistake unless the employee tendered back the consideration for the release (R. 135).

Petitioner's motion for a rehearing was denied (R. 150) and petitioner applied to the Supreme Court of Georgia for a writ of certiorari (R. 152) which was denied (R. 153).

REASONS FOR GRANTING THE WRIT

This case involves Federally Created Rights under the Federal Employer's Liability Act, and it is of great public importance that the Supreme Court construe and decide the questions raised in this petition since there is no *direct* ruling by this Court on the question. The opinion of the Court of Appeals of Georgia, in effect, states that since the question has never been decided by this Court, they will decide the question under Georgia law. This question could, and probably will, arise in courts throughout the entire United States, and should be decided by the Supreme Court of the United States since rights of railroad employees are jeopardized and the cases from different state courts are in conflict.

This Court stated in *Duncan v. Thompson*, 315 U.S. 1 (2 of opinion), 86 L.Ed. 575, 62 S.Ct. 422, that a contract between a carrier and its employee, requiring the return of consideration paid under the contract before suit could be filed and maintained was a contract, the purpose and intent of which was to enable the employer to exempt itself from liability under the Federal Employer's Liability Act, and therefore was to that extent void.

In *Dice v. Akron C. & Y. R. Co.*, 342 U.S. 359, 96 L.Ed. 398, 72 S.Ct. 312, this Court held that Federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not properly interposed to suits under the Act.

Petitioner contends that the pleading, by the carrier-employer, of a release given by its employee and the em-

ployer's contention that such release could not be attacked unless the employee first tendered back the consideration of the release, is such a device as is prohibited under 45 U.S.C. Section 55.

This Court held in *Philadelphia B & W. R. Co. v.* Shubert, 224 U.S. 601 56 L.Ed. 911, 916 (construing Section 5 of the Federal Employer's Liability Act; 45 U.S.C. 55) that necessarily the liability must survive the acceptance of the benefits, or there could be no recovery and hence no set off.

The Court went further and said:

> "The words 'the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act' do not refer simply to an actual intent of the parties to circumvent the statute. The purpose and intent of the contracts and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce."

Where, as in this case, an employer pleads a release as a bar to an action by its employee for injuries, but contends further that under state law, no attack can be made on the release, since there was no tender back of the consideration of the release, and thus the employee's suit should be dismissed, the employer is using state law as a device whereby its liability to its employee is defeated.

The holding of the Court of Appeals of Georgia, that, since no tender back of the consideration of the release was made, no attack could be made on the release and the employee's suit should be dismissed, is an at-

tempt by a state to declare what defenses can be interposed to rights granted under the Federal Employer's Liability Act.

Such ruling is in direct conflict with the interpretation placed on 45 U.S.C. 55 by various Federal courts in different circuits and by state courts as follows:

Irish v. Central Vermont R. Co., 164 F.2D 837 (4) 2nd Circuit:

> "A contract not to sue on claim within Federal Employers' Liability Act could by virtue of provisions in the Act be repudiated for fraud without a tender of consideration received."

Bowman v. Illinois Central Ry. Co., 132 N.W. 2nd 558 (5) (affirmed by Illinois Court of Appeals and by its Supreme Court, certiorari denied by United States Supreme Court (on another point), and holding that 45 U.S.C. Section 55 was enacted to prevent an employer who has received a release from its employee to assert return of the consideration as a condition precedent to employee's right to attack the release as a bar to the employee's action against the employer under 45 U.S.C. 51 et sequa.

Marshall v. New York Central R. Co., 218 F. 2d 900 (6) 7th Circuit, holding that where a release was obtained by fraud and misrepresentations, the employee was not required as a prerequisite to her right to maintain an action under the Act to make restitution of the amount which was received as consideration for the release.

Humphrey v. Erie R. Co., 116 F. Supp. 660 (S.D. of N.Y.) citing *Irish v. Central Vermont R. Co.*, 164 F. 2nd

837 (4) p. 667 n. 14, holding petitioner's action was not barred by reason of his failure to return the consideration of the release.

Johnson v. Elgin J. and E. Ry. Co., 87 N.E. 2d 567 (3), holds that a tender of the consideration of a release given by an employee to his employer is not a prequisite to the ployers' Liability Act, Also see:

Guy v. Cincinnati Northern R. Co. (Mich.), 166 N.W. 667 (3), certiorari denied 246 U.S. 668, 62 L.Ed. 930.

There is no question but that, both under Federal and Georgia Law, a release may be set aside for fraud or mistake of fact, thus the primary questions here are:

1. Whether the return of the consideration for a release is a prerequisite to an employee's maintenance of his action under the Federal Employers' Liability Act?
2. If such a return of the consideration is *not* required under the Act, then did not the ruling of the Court of Appeals of Georgia deprive petitioner of his right of action (a property right) in violation of the Fourteenth Amendment of the Federal Constitution?

It is petitioner's contention that there can be no doubt that petitioner has been deprived of his property right in his cause of action by the ruling of the state court, and that the state action is a violation of the Fourteenth Amendment of the United States Constitution in view of the fact that the court applied state rules of law (instead) of Federal law), which deprive him of the benefits given him under the Federal Employers' Liability Act.

That a state may not set at naught benefits granted by

Federal statute is set out in a well reasoned opinion as follows:

In *Taxin v. Food Fair Stores, Inc.*, 197 F. Supp. 827, 830, the court held, citing from *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176, 87 L.Ed. 165:

> "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by Erie Railroad (Co.) v. Tompkins, 304 U.S. 64 (58 S. Ct. 817, 82 L.Ed. 1188, 114 ALR 1487). There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law (citing cases)."

See also Restatement of the Law of Contracts, Section 480, page 831:

> "When Offer to Return Performance Received Is a Condition of the Power to Avoid."
>
> 2. A failure to return or offer to return performance received in accordance with the rule stated in subsection (1) does not preclude avoidance if the performance . . ."
>
> "(c) is merely money, the amount of which can be credited in partial cancellation of the injured party's claim . . ."
>
> "the plaintiffs are not barred from asserting fraud

by their failure to tender back the consideration of the release."

Petitioner contends that Congress, having preempted the field of relations between carriers and their employees has provided equitable protection for an employer by allowing any consideration paid to be deducted from any judgment obtained by the employee; and provided protection to the employee by prohibiting the employer from using any device which would defeat his liability to his employee for injuries received when an action is brought under the Federal Employers' Liability Act.

CONCLUSION

For the reasons stated, this Petition for a Writ of Certiorari to the Court of Appeals of Georgia should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE JUDGE OF THE SUPERIOR COURT OF FULTON COUNTY OVERRULING DEFENDANT'S DEMURRERS AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

No. B 19,529

HENRY HAROLD HOGUE

v.

SOUTHERN RAILWAY COMPANY

ORDER ON DEFENDANT'S RENEWED DEMURRER TO PLAINTIFF'S PETITION AS AMENDED, SAID RENEWED DEMURRER FILED 17th JANUARY 1967

The questions of the effect of the release and all related questions are to be determined exclusively by Federal law, and not by State law. The Court is of opinion that under Federal law, particularly Sec. 5 of the Federal Employers' Liability Act, the rule generally obtaining that return of the money received must be made or offered before filing suit in which the validity of the release is attacked (83 Ga. 558), does not apply, under the circumstances here alleged in plaintiff's amended petition.

Said renewed demurrer is overruled on each ground.
This 17th January 1967.

/s/ DURWOOD T. PYE
Judge Sup. Ct.

HENRY HAROLD HOGUE

v.

SOUTHERN RAILWAY COMPANY

No. B 19,529

ORDER ON MOTION FOR SUMMARY JUDGMENT

Said motion is overruled.

This 17 January 1967.

/s/ DURWOOD T. PYE
Judge Sup. Ct.

APPENDIX B

Opinion of the Court of Appeals of Georgia

In The

COURT OF APPEALS OF GEORGIA

No. 42869

42869 SOUTHERN RAILWAY COMPANY

vs.

HENRY HAROLD HOGUE H-48

In an employee's action for injuries under the Federal Employers Liability Act, a release entered into between the employer and employee in compromise and settlement of the claim cannot be attacked for mutual mistake unless the employee tenders the return of the consideration he received for the release.

This petition contains in effect the following allegations: The plaintiff was employed as a machinist for the defendant railroad, and while so employed was injured and totally disabled to continue that employment, and he brought this action under the provisions of the Federal Employers' Liability Act, 35 Stat. 66 (1908) 45 U.S.C.A., (1952). The petition alleged that shortly after this injury the plaintiff signed a release to the defendant based upon representations by the defendant's doctor, who was treating the plaintiff, that the plaintiff had only a bruised knee and representations of the defendant's

claims agent who negotiated the release with the plaintiff that the plaintiff's injuries would not be permanent and that he had been so advised by the doctor. Relying upon and believing the advice of the defendant's doctor that the injuries were not serious, both parties made a mistake of fact as to the extent of the plaintiff's injuries and that the plaintiff would completely recover therefrom. Thereafter complications from the injuries developed requiring surgical removal of the plaintiff's knee cap and cartilage from the knee and resulting in the plaintiff's disability. The consideration paid by the defendant for the release was grossly inadequate in view of the extent of the injuries.

On this appeal the defendant enumerates as error the judgment of the trial court overruling its general demurrer on the grounds that the petition set forth no cause of action and affirmatively showed that the plaintiff was barred from recovery.

HALL, Judge. Under our federal system, for the purposes of diversity jurisdiction, a federal court is "in effect, only another court of the State . . ." and "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court." *Guaranty Trust Co. v. York*, 326 U.S. 99, S. Ct. , L.Ed. ; *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, S. Ct. , L.Ed. . The corollary of this principle is the uniformity of federally created rights that seek enforcement in a State court; therefore, "local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws," e.g., the Federal Employers' Liability Act.

Brown v. Western Railway of Alabama, 338 U.S. 294, ___ S. Ct. ___, ___ L.Ed. ___. The question posed in the present case is controlled by federal law. *Dice v. Akron, C. v. Y. R. Co.*, 342 U.S. 359, ___ S. C. ___, ___ L.Ed. ___.

Section 5 of the Federal Employers' Liability Act (45 U.S.C.A. § 55), providing that any contract to enable any common carrier to "exempt itself from any liability created by this chapter shall to that extent be void," does not prevent a railroad from compromising or settling claims and obtaining releases based upon such settlements. *Callen v. Pennsylvania Railroad Co.*, 332 U.S. 625, 68 S. Ct. 296, 92 L.Ed. 242. "Untainted by fraud or overreaching, full and fair compromises of FELA claims do not clash with the policy of the Act." *South Buffalo R. Co. v. Ahern*, 344 U.S. 367, 372, ___ S. Ct. ___, ___ L.Ed. ___. However, a release induced by fraud or by mutual mistake as to the nature or extent of the releasor's injuries does not bar an action to recover for the injuries. *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 362, ___ S. Ct. ___, ___ L.Ed. ___; *Steele v. Erie R. Co.*, 54 F. 2d 688, 690 (W.D. NY 1930); *Chicago & N.W. Ry. Co. v. Curl*, 178 F. 2d 497 (8th Cir. 1949).

The sole question before this court—whether restitution by the claimant is a prerequisite of setting aside a release of claim under the FELA—has never been decided by the Supreme Court of the United States. There appears to be a direct conflict on this question among the other federal authorities. Some federal courts have held that an employee can maintain an action for injuries under the FELA alleging that a

release he has already given was executed as a result of fraud or mutual mistakes, without tendering restitution of the money received for the release. *Marshall v. New York Central R. Co.*, 218 F. 2d 900 (7th Cir. 1955); *Irish v. Central Vermont Ry., Inc.*, 164 F. 2d 837, 840 (2d Cir. 1947); *Humphrey v. Erie R. Co.*, 116 F. Supp. 660 (S.D. NY 1953); accord *Graham v. Atchison, T & S R. Co.*, 176 F. 2d 819 (9th Cir. 1949); see Anno. 96 A.L.R. 2d 655.

The interpretation of federal law on this question in *Collett v. L. & N. R. Co.*, 81 F. Supp. 428 (E.D. Ill. 1948), that a release entered into in compromise and settlement of a claim cannot be attacked for fraud unless the releasor tenders the return of the consideration for the release, is the same as the law that prevailed in Georgia before and after the Federal Employers' Liability Act *East Tennessee, Virginia and Georgia Ry Co., v. Hayes*, 85 Ga. 558 (10 S.E. 350); *Central of Ga. Ry. Co. v. Hoban*, 24 Ga. App. 686 (102 SE 46) There is no reason to alter the rule when the release in attacked for mutual mistake instead of fraud. The Florida Court of Appeals has decided the question as it was decided in the Collett case, supra. *Overstreet v. Atlantic Coast Line R. Co.*, Fla. App (152 So. 2d 188). We are not persuaded to interpret the federal law applicable under the Federal Employers' Liability Act differently in the absence of controlling federal authority.

The trial court erred in overruling the defendant's demurrer to the petition.

Judgment reversed. Felton, C. J., and Eberhardt, J., concur.

COURT OF APPEALS
of the State of Georgia

No. 42869

Atlanta, September 21, 1967

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

Southern Railway Co. v. H. H. Hogue

It is ordered that the remittitur in this case be stayed pending an application for the writ of certiorari to the Supreme Court of the United States.

NOTE: Please place your order for the preparation of the record as promptly as you can.

* * *

Court of Appeals of the State of Georgia

September 21, 1967

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

MORGAN THOMAS, *Clerk*

APPENDIX C

45 U.S.C. Section 51

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the State and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the State or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employees, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employees of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the bene-

fits of this chapter. April 22, 1908, c. 149, § 1, 35 Stat. 65; August 11, 1939, c. 685, § 1, 53 Stat. 1404.

* * *

45 U.S.C. Section 55

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. April 22, 1908, c. 149, § 5, 35 Stat. 66.

CERTIFICATE OF SERVICE

I, Samuel D. Hewlett, do certify that the foregoing petition for certiorari was served on the defendant by serving its attorney, John D. Jones, Esquire, Green, Buckley, DeRieux, Moore & Jones, 1240 National Bank of Georgia Building, Atlanta, Georgia, by furnishing them a copy through the United State Mail with proper postage thereon, on ....., 1967.

.....